IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No.....

JASPER CHAIR COMPANY, a Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF

In Support of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

THE OPINION.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, filed November 6, 1943, is not yet reported. For convenience, a copy thereof is at-

tached to this brief as Appendix No. 1. Also attached hereto as Appendix No. 2 is a copy of the Order and Decree of said Circuit Court of Appeals in said proceeding, and which was entered November 27, 1943.

II.

A CONCISE STATEMENT OF THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This statement is set out in the preceding Petition under II, "Basis of Jurisdiction" (pp. 5-6), which is hereby adopted and made a part of this brief by reference.

III.

A CONCISE STATEMENT OF THE CASE CONTAINING ALL THAT IS MATERIAL IN THE CONSIDERATION OF THE QUESTIONS PRESENTED.

This statement is set out in the preceding Petition under I (pp. 1-5) and IV (pp. 8-12), which is hereby adopted and made a part of this brief by reference.

IV.

SPECIFICATION OF THE ASSIGNED ERRORS WHICH ARE URGED.

This specification is set out in the preceding Petition under III thereof (pp. 7-8), which is hereby adopted and made a part of this brief by reference.

V.

THE ARGUMENT.

1. The National Labor Relations Board included in its Decision and Order the following sentence:

> "The Board has considered the Intermediate Report, the exceptions and the brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner."

It included in its Decision and Order no other findings of fact.

Section 10 (c) of the National Labor Relations Act contains the following sentence:

> "If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, **then the Board shall state its findings of fact** and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." (Emphasis supplied.)

The statute contains a mandatory provision that if the Board shall be of the opinion that one named in a complaint has engaged in or is engaging in a charged unfair labor practice, "then the Board shall state its findings of fact."

A statement such as that set out in the Board's Decision and Order, adopting the findings, conclusions and recommendations of the Trial Examiner, is not, in the opinion of this petitioner, a compliance with the statutory mandate in this regard. Manifestly, the Congress intended that the Board should state its findings. In all probability Congress had in mind the responsibility it desired to impose upon

the Board. It is true that this court has held that it is not the function of the court "to probe the mental process" underlying a Board's decision. It is also true this court has held that courts must accord to the Board's decisions the presumption of regularity to which they are entitled. These observations, however, do not go to the point, and that is: The statute definitely requires the Board to state its findings. For the Board to say that it has considered the Intermediate Report, the exceptions and the brief, and the entire record in the case, and by its finding and order adopts the findings, conclusions and recommendations of the Trial Examiner, in the opinion of this petitioner, definitely denies the statutory mandate requiring the Board to state its findings of fact.

The so-called "historic practice" set out by this court in its opinion in **Crowell v. Benson, 285 U. S. 22,** refers to a Congressional enactment which did not contain a clause similar to the one found in Section 10 (c) of the National Labor Relations Act, and hereinabove set out.

If fact finding were merely a ministerial function, it might be delegated by the Board to its Trial Examiner. However, to say the least, such power is quasi judicial in its nature and cannot be delegated.

> Cf. Cudahy Packing Co. v. Holland, Administrator, 315 U. S. 357, 788.

When the Board said it had considered certain matters presented to it and adopted the findings of its Trial Examiner, it in effect has said that it did not make its own findings.

Findings of fact in an unfair labor practice case before the National Labor Relations Board are far too important to be lightly considered. The Act itself provides that the usual rules of evidence in courts of law shall not prevail. The Act also prevents a reviewing court from disturbing a finding based upon substantial evidence.

Therefore, what may seem to be a mere trifle at the hearing and what may simply be hearsay evidence can ripen into a finding which will ultimately be the basis of an injunction by a United States Circuit Court of Appeals, and the violation of which would place in jeopardy the liberty of an offender.

Concluding this branch of the argument, this petitioner urges that under no circumstances should the National Labor Relations Board be permitted to deviate one bit from the strict statutory requirement that it shall state its findings.

2. In its decision and opinion the court below granted enforcement of a Board order which held that this petitioner had violated subsections (1) and (3) of Section 8 of the National Labor Relations Act when it discharged Leo Lannan. Such a purported finding does not, in the opinion of this petitioner, involve merely a choice on the part of the fact finding body of who to believe or who not to believe where evidence is conflicting, nor does it involve what inferences the fact finding body may draw from conflicting evidence. The point in connection with Lannan is this—to infer that he was discharged because of his Union activity means that the fact finding body is drawing a finding based upon such inference in total disregard of and in direct contradiction to the positive and uncontradicted and corroborated evidence of witnesses who testified that his discharge was because of his conduct and not because of his alleged Union activity. A detailed discussion of the evidence would consume more space than this petitioner understands is permitted in this brief. However, the testimony in the record before the Court with reference to Lannan, this petitioner states, will abundantly support the statements contained in this brief on this subject.

It is the position of the petitioner with reference to Lannan that there is no substantial evidence justifying a

purported finding of fact that he was discharged in violation of subsections (1) and (3) of Section 8 of the National Labor Relations Act.

> Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, at 229;
> National Labor Relations Board v. Columbian Enameling & Stamping Co., Inc., 306 U. S. 292, at 299 and 300.

In the case last cited this Court said:

> "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' "

Evidence in the record is positive to the effect that Lannan was discharged for reasons and causes entirely foreign to his Union activity. It is no more than a suspicion—certainly not by inference—that there could be a finding, or a purported finding, that this petitioner discharged Lannan because of Union activity.

3. The third question presented deals with a purported finding to the effect that this petitioner was guilty of an unfair labor practice because its superintendent was seen standing on the Court House steps in Jasper, Indiana, at 9 o'clock on one Thursday evening in November, 1941. The record shows that the Court House is situated in the center of a public square, and that the Court House and the surrounding square are and on that night were well lighted. The record further shows that on the night in question the complaining Union was holding one of its regular weekly meetings in a hall the entrance to which was on the public square, and that said entrance was approximately one hundred feet from the point where the superintendent was alleged to have been standing. It is fair to infer from the record that the Union selected its meeting place a long

period of time after the Court House was erected. The superintendent specifically denies that he was on the square any evening other than when the municipal band conducted concerts. He remembers that because his boy played in the band and he came to town to hear the band concerts. However, leaving out of this discussion these conflicts which involve the question as to whether or not the superintendent was on the Court House steps at that particular time, let us assume that the superintendent was on the Court House steps at the indicated time and that he knew that the complaining Union was holding a meeting on that particular night. Then, from what rule or principle does the strange finding derive that a citizen of a community, simply because he holds a supervisory position for a manufacturing concern, must avoid being seen, more than that, must avoid being at a place where he could see who would enter or come out of the meeting place deliberately selected by the Union, which was presumably engaged in organizing the employes in his plant? The record shows that over a long period of time, probably a year, the superintendent was seen on the public square on three different occasions. On one occasion he was on the Court House steps, and on each of the other two occasions, according to the evidence, he was at some other point on the public square.

This petitioner insists that a finding of an unfair labor practice predicated on these facts is not sustained by any substantial evidence.

4. The court below in its decision and opinion held that it would issue a decree, and thereafter did make and enter a decree, against this petitioner, including the following:

> "(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

concerted activities for the purposes of collective bargaining and other mutual aid or protection, as guaranteed in Section 7 of the Act."

This petitioner respectfully urges that to include the above quoted provision is a violation of the rule laid down by this Court in its decision in **National Labor Relations Board v. Express Publishing Company, 312 U. S. 426.**

The petitioner urges that there should be no finding or order made against it with reference to the Lannan transaction. Consequently, there would not be any violation whatever of subdivision (3) of Section 8 of the Act. If its position is correct in this regard, then all that remains in this case are some minor matters which could only be considered violations of the generalizations included in subdivision (1) of Section 8 of the Act, and would be insufficient to justify any adverse order. Of course, if this petitioner is correct in these contentions, then the entire cease and desist order will go out. Assuming, however, that the Lannan transaction remains and a finding and order is made against this petitioner with respect thereto, it is nevertheless the contention of this petitioner that the hereinabove quoted portion of the order, which also, of course, is in the court's decree, must of necessity either be entirely eliminated or very substantially restricted in order to conform with the rule laid down by this court in **National Labor Relations Board v. Express Publishing Company**, supra.

If the above quoted clause is permitted to remain, then this petitioner will be required to conduct all of its labor relations with the threat of contempt proceedings hanging over its head. Each time it engages the services of a prospective employe, or discharges an employe, or shifts an employe from one job to another, or decreases the rate of compensation of an employe, or temporarily lays off an employe, or does any one of many other things required

from day to day in operating a manufacturing plant, it must first stop and measure its conduct, and probably obtain legal advice, to determine whether or not it is in actual or threatened danger of contempt of the United States Circuit Court of Appeals for the Seventh Circuit. This petitioner submits such a condition should not be permitted to exist under the facts, as revealed by the record in this case. On the contrary, to permit such a condition would defeat the announced purpose of the National Labor Relations Act.

5. In the preceding petition under the heading "Reasons Relied on for Allowance of the Writ," this petitioner has set out in connection with each of the four questions presented the reason why it is entitled to have its petition herein granted. No good purpose can be served by again discussing these reasons, as such discussion would be merely a repetition of what is set out in the petition, as aforesaid.

Respectfully submitted,

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